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IN THE

Supreme Court of the United States

October Term, 1959.

No. 455

ALEXANDER FUDEMAN,

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA.

ABRAHAM MINKER,

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

ALEXANDER FUDEMAN and ABRAHAM MINKER, your petitioners, pray that a writ of certiorari issue to review the judgments of the Supreme Court of Pennsylvania entered in the above-entitled companion cases on May 28, 1959.

OPINIONS BELOW.

The opinions of the court below (Appendix A, *infra*, pp. A1-A59) in these companion cases, were reported in 396 Pa. 236, 152 A. 2d 428 (1959), 396 Pa. 277, 152 A. 2d 449 (1959); and 186 Pa. Super. 547, 142 A. 2d 473 (1958). The opinions of the Berks County Court (pp. A60, A64) were not reported.

JURISDICTION.

The judgments of the court below (Appendix B, *infra*, pp. A67-A68), were entered on May 28, 1959. Petitions for rehearing in each case were denied on July 10, 1959 (Appendix C, *infra*, p. A69). The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(3).

QUESTIONS PRESENTED.

1. Where indictment by a Grand Jury is guaranteed by the State Constitution as interpreted by the State courts, and where the State provides for interlocutory appeals from refusal of lower courts to quash indictments, is it a denial of due process and of equal protection guaranteed by the 14th Amendment for the appellate courts of the State to refuse to decide in advance of trial whether defendants were deprived of an unbiased and unprejudiced Grand Jury hearing?

2. Where some of the Grand Jurors held unauthorized discussions about the charges against petitioners prior to their deliberations, and where officers of the State Police investigated and interviewed those Grand Jurors prior to their deliberations, were the defendants deprived of their constitutional rights to an indictment by an unbiased and legally constituted Grand Jury?

CONSTITUTIONAL PROVISIONS INVOLVED.

Constitution of U. S., Amendment, Article XIV:

> ". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Constitution of Pa., Art. I, § 9:

Rights of accused in criminal prosecutions.

"In all criminal prosecutions the accused hath a right . . . to demand the nature and cause of the accusation against him. . . ."

Constitution of Pa., Art. I, § 10:

Criminal information, twice in jeopardy, eminent domain.

"No person shall, for any indictable offense, be proceeded against criminally by information, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger, or by leave of the court for oppression or misdemeanor in office. . . ."

STATEMENT OF THE CASE.

On November 13, 1957, a complaint against both petitioners were sworn to by a State Policeman, charging both defendants with unlawfully intimidating and extorting money from named individuals. Warrants were issued and, after several hearings, defendants were held for the March 1958 Grand Jury. On petition of the District Attorney of Berks County and a Deputy Attorney General, an order of the Berks County Court was entered to convene the December 1957 Grand Jury. On January 24, 1958, the December 1957 Grand Jury convened; the same foreman was appointed, and the jury was re-sworn.

Prior to the convening of the Grand Jury, certain of its members had unauthorized communications and contacts with each other in connection with this and other cases arising out of the same set of circumstances. An officer of the Pennsylvania State Police interviewed at least one of the Grand Jurors concerning these communications, and subsequently one of the Grand Jurors was arrested on the charge of embracery (attempting to corrupt or influence jurors).

Prior to the swearing in, counsel for the Commonwealth, in the absence of the accused or their counsel, questioned the Grand Jury about their contacts with each other, but did not press the inquiry. The presiding judge in his charge lightly passed over the mention of these contacts, instructing the jurors to ignore any attempts by outside persons or other Grand Jurors to influence their decisions. On the same day the case of the appellants was presented, and True Bills were found.

On January 27, 1958, petitions to quash the indictments were filed, alleging, *inter alia*, that they had been found at an earlier term than the one to which the defendants were held; that no notice was given to the accused or their counsel, and that, therefore, no opportunity existed to challenge the array; that the accused's constitutional rights under the Constitutions of Pennsylvania and of the United States were violated in that members of the Grand Jury had communications and contacts with each other prior to their deliberations, and that State policemen contacted the Grand Jury and interviewed at least one of them, which again was harmful and deprived the accused of a fair and impartial hearing; that had they known these matters, they would have challenged the array. The Commonwealth's Answers to these Petitions admitted all of the facts but denied the conclusion that the indictments were rendered invalid. On March 3, 1958, after argument and without hearing evidence, the Quarter Session Court dismissed the petitions to quash.

Appeals were taken to the Superior Court of Pennsylvania, which refused to hear argument on the merits. On June 11, 1958, the Superior Court entered an order granting the Attorney General's motion to quash the appeals on the grounds that the appeals were interlocutory; separate dissenting opinions were filed by two Judges of that court.

Petitions for allowance of appeal from the judgments of the Superior Court were filed in the Supreme Court of

Pennsylvania, and the petitions were allowed and appeals granted on August 8, 1958. That Court affirmed the orders of the Superior Court quashing the appeals, concluding in each case that "no basic human right of this defendant has been violated or prejudiced." One Justice filed a dissenting opinion, noting that the lower court's admonition to the Grand Jury had not effectively protected defendants against the corrupting influence of the unauthorized contacts and investigation, denying that the the Attorney General had validly superseded the local District Attorney, suggesting that each indictment was invalid on its face, and concluding that defendants' constitutional rights were violated. The Chief Justice concurred with the majority in the result.

Petitions for rehearing were filed with the Supreme Court, but were refused on July 10, 1959.

REASONS FOR GRANTING THE WRIT.

The State of Pennsylvania has guaranteed to its citizens the constitutional right not to be required to answer to criminal charges except if they are founded on a Grand Jury proceeding. Having provided this right, it is a deprivation of due process and denial of equal protection for the State courts to refuse to determine whether a Grand Jury proceeding is free from prejudice. A refusal by the State courts to do so in this case in advance of trial, even though in other cases they will review the validity of indictments in advance of trial and will hear interlocutory appeals, is to discriminate under the guise of local practice against the assertion of federal constitutional rights.

* * *

1. Review by a writ of certiorari is available in this Court of "final judgments or decrees rendered by the highest court of a State in which a decision could be had," under the circumstances outlined in 28 U. S. C. § 1257(3). The decisions here are final in the real and important sense that the appellate courts of the State

have finally and conclusively determined that petitioners must incur the expense, agony and embarrassment of a trial and face the possibility of conviction on charges founded on an entirely void proceeding in which they have been denied a preliminary hearing free from prejudice. If convicted, petitioners may ultimately be permitted again to raise their objections to the preliminary proceedings after the agony and expense of a potentially lengthy trial; but it would be an unusual Judge who at that posture of the case would be willing to reverse a conviction even for substantial errors in the preliminary proceedings.

This Court has demonstrated that although a judgment may not be termed final, it will look beyond the "face of the judgment" to see whether the judgment is actually final. *Clark v. Williard*, 292 U. S. 112 (1934); *Gospel Army v. Los Angeles*, 331 U. S. 543 (1947); *Rescue Army v. Municipal Court*, 331 U. S. 549 (1947); see *Robertson and Kirkham, Jurisdiction of the Supreme Court of the United States*, § 26 (1951 ed.). It will grant review where the record shows that the "order of the appellate court has in fact fully adjudicated rights and that adjudication is not subject to further review by the state court." *Gospel Army v. Los Angeles, supra*, at 547; *Robertson and Kirkham, op. cit. supra*, at note 5, p. 55.

The appellate courts here have fully adjudicated adversely to petitioners their right not to stand trial after a void accusatory process.

This Court has said:

> The institution of the Grand Jury . . . is designed as a means not only of bringing to trial persons accused of public offenses upon just grounds, but also as a means of protecting the citizen against unfounded accusation, whether it come from the government, or be prompted by partisan passion or private enmity. No person shall be required . . . to answer for any

> of the higher crimes unless this body, consisting of not less than sixteen nor more than twenty-three, good and lawful men, selected from the body of the district, shall declare upon careful deliberation, under the solemnity of an oath, that there is good reason for his accusation and trial . . . (T)he Grand Jury is as valuable as ever in securing . . . an individual citizen from an open and public accusation of crime, and from the trouble, expense and anxiety of a public trial before a probable cause is established by the presentment and indictment of such a jury. . . .". *Ex Parte Bain*, 121 U. S. 1, 30 L. ed. 849, 852-853 (1887).

Yet in the case at bar, the appellate courts of the State have refused to determine whether "good and lawful men" have declared "upon careful deliberation" that there is good reason for their accusation and trial. On the contrary, they are forcing the petitioners to go to the "trouble, expense and anxiety of a public trial" before determining that probable cause has been established by the presentment and indictment of such a Grand Jury. If this Court would ultimately have to reverse a conviction based on the preliminary proceedings here involved, it is within this Court's power to save the petitioners from the very harm envisioned in *Ex Parte Bain*, *supra*, and also incidentally to save the government the expense of a prolonged trial which will serve only as a void gesture.

Interlocutory appeals challenging indictments are authorized in Pennsylvania. In *Commonwealth v. Kilgallen*, 175 Pa. Super., 52, 103 A. 2d 183 (1954), the Pennsylvania Superior Court summarized the rule as follows:

> "In general a defendant charged with crime does not have the right of appeal before his trial and conviction, nor thereafter until after final judgment of sentence. But our Supreme Court in entertaining an appeal under unusual circumstances to prevent injustice, where no sentence had been imposed, said:

'this rule should not be held one of universal application.' Commonwealth v. Trunk, 311 Pa. 555, 565, 167 A. 333, 337. The rule is not inflexible and will yield in exceptional cases. Commonwealth v. Ragone, 317 Pa. 113, 176, A. 454. This court has made exception on occasion to the rigid application of the rule. Commonwealth v. Haines, 130 Pa. Super. 196, 196 A. 621; Cf. Commonwealth v. Haimbach, 151 Pa. Super. 581, 30 A. 2d 653. In Commonwealth v. Edmiston, 30 Pa. Super. 54, we asserted jurisdiction to entertain an appeal where the controlling question involved the validity of an order of the lower court in refusing to quash an indictment' . . . True, the appeal in the Edmiston case was taken after trial, conviction and sentence but the case does not negative our authority under special circumstances to entertain an appeal before trial of the defendant from the refusal to quash an indictment.

"In our view the question of the validity of the indictments in these cases is one which under the circumstances should be decided in limine with finality. The nature of the charges affects the public interest, and the grounds for appellant's claim of immunity, provide the exceptional circumstances which justify us in entertaining the appeals in these cases."

On appeal in that case the Supreme Court, reversing on other grounds, referred to the Superior Court's decision that there were exceptional circumstances justifying the appeals and stated: "We are not disposed to disagree with this conclusion." *Commonwealth v. Kilgallen*, 379 Pa. 315, 108 A. 2d 780, 783 (1954).

The case of *Commonwealth v. O'Brien*, 389 Pa. 109 (1957), relied upon by the majority of the Superior and Supreme Courts here, did not purport to overrule the doctrine set out in the *Kilgallen* case. On the contrary,

the *O'Brien* case merely reiterated the general principle and concluded that the case there did not fall within any of the exceptions; however, it did not purport to negative the existence of those exceptions.

Thus, a remedy exists in the State courts permitting petitions to challenge indictments before trial. To allow the appellate courts of the State to refuse to apply the remedy here would be to permit them, under the guise of local practice, to discriminate against the assertion of Federal constitutional rights. Such discrimination was held by this Court to violate the Constitution in *Staub v. Baxley*, 355 U. S. 313 (1958).

Thus, if the appellate courts of Pennsylvania, in order to prevent injustice, are authorized and required to review decisions which are not technically final but are interlocutory, then their refusal to do so, when violation of the Federal constitutional rights of due process and equal protection are charged, is a full and final adjudication of the type subject to review by this Court.

2. In the case at bar, the Supreme Court of Pennsylvania, relying on the *O'Brien* case, concluded that no basic human rights of the petitioners had been violated. If the constitutional right to a hearing, free from prejudice is considered a basic human right, then the Supreme Court of Pennsylvania was wrong and it should have reviewed this case on its merits and should have decided that petitioners could not be forced to stand trial without a valid preliminary accusatory proceeding.

The Constitution of Pennsylvania has been interpreted by the appellate courts of that State to guarantee to defendants the right to be tried on criminal charges only upon a Bill of Indictment duly found by a properly constituted Grand Jury. *Commonwealth v. Wadley*, 169 Pa. Sup., 490, 83 A. 2d 417 (1951), citing *Constitution of Pennsylvania*, Article I, § 10, Article I, § 9; *Dauphin County Grand Jury Investigation Proceeding* (No. 2), 332 Pa. 342, 2 A. 2d 802 (1951); *Hartranft's Appeal*, 85 Pa. 433; 42

C. J. S., Indictments and Informations, § 1; 27 *Am. Jur., Indictments and Informations*, § 2.

Where the State provides accused persons with a constitutional right to a Grand Jury hearing, then the federal concepts of due process and equal protection demand that the Grand Jury hearing be free from prejudice and bias.

In the federal context, this Court has concluded that defendants are entitled to Grand Jury hearings free from procedural errors. This Court, while holding that the Fifth Amendment does not require an inquiry into the evidence presented to a Grand Jury, did suggest that the Fifth Amendment requires that a defendant should not be held to answer except to an indictment returned by a legally constituted and unbiased Grand Jury. *Costello v. United States*, 350 U. S. 359, 363 (1956). This Court has even invalidated a murder conviction based on an indictment by a Grand Jury which was drawn from a panel systematically excluding negroes, therefore violating a State constitutional provision. *Pierre v. Louisiana*, 306 U. S. 354 (1939).

Thus, this Court, like the courts of Pennsylvania, has concluded that an indictment found by an improperly constituted Grand Jury, or in an improper manner, is equivalent to no indictment, and conviction thereunder would constitute deprivation of a constitutional right. Even in the Federal Courts, where under appropriate circumstances criminal proceedings can be instituted by information rather than indictment, the sanctity of the Grand Jury is zealously guarded. *United States v. Carper*, 116 F. Supp. 817 (D. C. D. C. 1953), and cases therein cited.

In the case at bar, the lower court summarily rejected defendants' contentions that the entire foundation upon which the defendants were called to answer was a nullity. The State admitted in its Answers to the Petitions to Quash the Indictments that the communications among grand jurors were unauthorized, and that the investigation by the

State Police took place. The appellate courts of Pennsylvania have refused to require an inquiry as to the prejudicial effect of the communications and investigation. The appellate courts of the State have apparently relegated the defendants to the expense, embarrassment, inconvenience and irreparable harm of a potentially lengthy trial, with the right to raise these objections only after the shame of a conviction.

3. Even though the State courts have refused to inquire whether prejudice resulted from the above contacts and investigation, there is ample reason to assume from the facts admitted by the Commonwealth that prejudice actually resulted. This Court recently condemned all extraneous influences upon jurors and noted that private contacts with jurors over trials are deemed presumptively prejudicial. In *Remmer v. United States*, 347 U. S. 227 (1954), the unauthorized contacts and pressures on the jurors were remarkably similar to those in the case at bar. After petitioner was convicted of wilful evasion of Federal income taxes, he learned that during the trial an unnamed person had communicated with a juror, who later became the jury foreman, and remarked that the latter could profit by bringing in a verdict favorable to the petitioner. The juror reported the incident to the Judge, who informed the prosecuting attorneys. As a result, the F. B. I. investigated it and reported to the Judge and prosecutors alone, who concluded that the statement was made in jest. Petitioner was not informed of the incident. The District Court denied the petitioner's motion for a new trial, and the Court of Appeals affirmed, since petitioner had shown no prejudice. On appeal, the Supreme Court remanded for a hearing to determine whether the incident complained of was harmful, stating:

> "In a criminal case, any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively

> prejudicial, if not made in pursuance of known rules of the court and the instructions and directions of the court made during the trial, with full knowledge of the parties. The presumption is not conclusive, but the burden rests heavily upon the government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant. Mattox v. United States, 146 U. S. 140, 148-150, 36 L. ed. 917, 920, 921, 13 S. Ct. 50; Wheaton v. United States, (C. A. 8th S. D.) 133 F. 2d 522, 527." 347 U. S. 227, at 229.

On remand, the District Court held a hearing, which was limited to the purpose and effect of the F. B. I. investigation, and found the incidents to be free of harm. Again it was appealed to the Supreme Court, which reversed and remanded, with directions to grant a new trial. The Court stated that the entire picture should have been explored, including the

> "communication with the juror and the impact thereof upon him then, immediately thereafter, and during the trial, taken together with the fact that the F. B. I. was investigating a circumstance involving a juror, and the fact that he never knew all during the balance of the trial what the outcome of that investigation was . . . .
>
> "Proper concern for protecting and preserving the integrity of our jury system dictates against our speculating that the F. B. I. agent's interview with Smith, whatever the Government may have understood its purpose to be, dispersed the cloud created by Satterly's communication. As he sat on the jury for the remainder of the long trial and as he cast his ballot, Smith was never aware of the Government's interpretation of the events to which he, however unwillingly, had become a party. He had been subjected

to extraneous influences to which no juror should be subjected, for it is the law's objective to guard jealously the sanctity of the jury's right to operate as freely as possible from outside unauthorized intrusions purposefully made." *Remmer v. United States*, 350 U. S. 377, 381-382 (1956).

In another recent case, the Supreme Court reversed a conviction and granted a new trial upon evidence that an F. B. I. agent, *investigating another case*, telephoned or visited members of the petit jury or their families during the trial of the defendant. The Court granted a new trial "because of official intrusion into the privacy of the jury. . . . The fact that the intrusion was unintentional does not limit the effect of the intrusion." *Gold v. United States*, 352 U. S. 985 (1957). In *Mattox v. United States*, 146 U. S. 140 (1892), this Court reversed a conviction and granted a new trial on evidence that the bailiff made comments about the case to the jurors during their deliberations and newspaper comments were admitted to the jury room during deliberations. And in *Wheaton v. United States*, 133 F. 2d 522 (8th Cir. 1943), the Court of Appeals similarly concluded that comments by the bailiff to jurors during deliberations were presumptively prejudicial and cast suspicions on the fairness of the trial.

The Commonwealth here contended that these cases are distinguishable, since they involved petit jurors where unanimity is required, rather than Grand Juries, where a mere majority is necessary for the finding of a True Bill. The speciousness of this argument is apparent. Extraneous influences are absolutely forbidden and are presumed to be prejudicial; the potential effect of a corrupted Grand Juror on the remaining jurors makes such contacts equally noxious. Furthermore, the investigation of some of the Grand Jurors, which was known to the others, is as disturbing an influence as can be imagined. In addition, if we are to pay more than lipservice to the institution

of the Grand Jury, which is a constitutional right in Pennsylvania, then the sanctity of the Grand Jury is no less important to the administration of justice than the sanctity of the petit jury. *Ex Parte Bain, supra*, and *United States v. Carper, supra*.

At the very least, the appellate courts owed the duty of following the decisions of this Court by requiring the lower court to inquire as to the prejudicial effect of those unauthorized contacts and investigation.

CONCLUSION.

For the reasons set out above, it is respectfully submitted that this Court should grant this petition for a Writ of Certiorari to review the decisions of the Supreme Court of Pennsylvania.

Respectfully submitted,

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